YEO SIM HUAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) October 20, 1961]

[Muar — Criminal Appeal No. 50 of 1961]

Criminal Procedure — Serious charge — How it should be explained and recorded — Qualified plea of guilty.

In a case serious enough to call for severe penalties and where accused is unrepresented every ingredient and question of the charge should be explained to the accused by the Magistrate and his replies recorded. No plea of guilty should be recorded if there is doubt that the plea is not an unequivocal plea of guilty.

Ruling in *Koh Mui Keow* v. *R.* (1) applied.

Case referred to:—

(1) *Koh Mui Keow* v. *R.* [1952] M.L.J. 214.

CRIMINAL APPEAL.

C. Paramjothy for the appellant.

Tengku Rithaudeen (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The charge against the appellant was that he did land goods imported by sea 20 pigs from a vesssel at a place other than a legal landing place contrary to section 22(1) and (2) of the Customs Ordinance, No. 12 of 1952, and punishable under section 134 thereof.

The appellant pleaded guilty to the charge. He was fined $200, or in default two months' imprisonment. The pigs were ordered to be sold and the proceeds to be credited to revenue. The boat and 53 cages were ordered to be confiscated. The appellant appealed against conviction and sentence.

There is nothing in the record to indicate how the charge and the questions involved were explained to the appellant. It was held in the case of *Koh Mui Keow* v. *Regina,*(1) that in a case serious enough to call for severe penalties, as in this case, and where the accused was unrepresented, every ingredient and question should be explained by the Magistrate to the accused and his replies recorded, and a plea of guilty should not be recorded if there is any doubt whether the plea was an unequivocal plea of guilty.

In this case, the appellant having "admitted the facts" proceeded to say that the engine broke down and the animals had to be unloaded. This to my mind is a qualified plea of guilty and the plea of guilty should not have been entered. I therefore allowed the appeal and ordered the case to be remitted to the Sessions Court for retrial before another President.

Appeal allowed.

Solicitors: *P. T. Wong & Co.*

BAGHER SINGH v. CHANAN SINGH & ANOR.

[C.A. (Thomson C.J., Good J.A., Neal J.) October 25, 1961]

[Ipoh — Civil Appeal No. 28 of 1961]

Transfer of land to avoid judgment execution — Transferee not party to fraud — Title of transferee — Application of common law under s.3(1), Civil Law Ordinance, 1956 and s.42(ii) and (vi) of F.M.S. Land Code (Cap. 138).

The first respondent was the registered proprietor of a piece of land but the evidence disclosed, and it was accepted by the Court of first instance, that half the purchase money had been contributed by the second respondent. On July 4, 1958 the appellant obtained a judgment against the first respondent but before he could execute it, the first respondent, on July 9, 1958, executed a memorandum of transfer, for valuable consideration in favour of the second respondent. With the registration of this memorandum of transfer, the second respondent became the registered proprietor of the land. The appellant claimed a declaration that the transfer to the second respondent was fraudulent as against him. It was argued for the appellant that because there was no statute in force in the Federation of Malaya dealing specifically with conveyances in fraud of creditors, the common law should be applied under section 3(1) of the Civil Law Ordinance, 1956, or if not under this Ordinance, then under section 42(vi) of the F.M.S. Land Code.

Held: (1) that section 3(1) of the Civil Law Ordinance could be invoked only where there was a *lacuna* in the law. In the law applicable to the facts of the case, there was no *lacuna*, because section 42 of the F.M.S. Land Code made provision for fraudulent dispositions of land;

(2) the common law could not be applied under section 42(vi) of the F.M.S. Land Code in this particular instance because section 42(ii) made specific provision for such cases;

(3) as the second respondent was not a party to the fraud his title could not be defeated under the provisions of section 42(ii) and in consequence the declaration sought by the appellant could not be granted.

Cases referred to:—

(1) *The Hontestroom (Owners)* v. *The Sagaporack (Owners)* [1927] A.C. 37.

(2) *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243.

(3) *Watt* v. *Thomas* [1947] A.C. 484.

(4) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

(5) *Rickards* v. *Attorney-General* 8 E.R. 1306.

(6) *Cadogan* v. *Kennet* 98 E.R. 1171.

CIVIL APPEAL.

N. Sharma for the appellant.

F. C. Arulanandom for the respondents.

Thomson C.J.: I agree with what my Lord has said.

One cannot help feeling a certain amount of sympathy for the appellant because the case is full of grounds for suspicion. For myself I am not prepared to say that had I tried it I would necessarily have come to the same conclusion as the trial Judge. Nevertheless considering the trial Judge's judgment in the light of the

authorities which have been quoted by my Lord, so far as I understand them, I can find no misdirection, no error in law, no defect in reasoning which would justify this Court in interfering.

I therefore agree with the course proposed by my Lord that the appeal should be dismissed with costs.

Good J.A.: This is an appeal from a decision of Azmi J. dismissing an action brought by the appellant in the High Court at Ipoh. The proceedings arose out of the transfer of a share in a piece of land in the Mukim of Ulu Kinta by the first respondent to the second respondent.

The facts are simple and can be stated shortly. The first respondent became the registered owner of a 160/786ths undivided share in the land by purchase in 1955. The consideration was $6,000 and the respondents say that they put up $3,000 each. According to the respondents, the reason for the first respondent becoming registered in his own name as proprietor of the share was that the second respondent was then a schoolboy of 18 and neither of them knew of the provisions of the Land Code enabling any person aged 18 and upwards who is domiciled in Asia to be a registered proprietor of land.

On the 4th July, 1958, the appellant obtained a judgment against the first respondent for $1,913 in the Ipoh Sessions Court. On the 9th July the first respondent executed a memorandum of transfer of his share in the land in favour of the second respondent. The memorandum was registered on the following day, which had the effect of making the second respondent the registered proprietor. The consideration stated in the memorandum was $6,000, which was explained in evidence by both the respondents as consisting of the $3,000 paid by the second respondent in 1955 and a further $3,000 which he paid to the first respondent in February 1958 with the object of buying him out.

The effect of this transaction was to deprive the appellant of the opportunity of executing his judgment against the first respondent's share in the land, for having obtained an order for execution from the Sessions Court which he presented to the Registrar of Titles on the 12th July, 1958, he was met with the information that the first respondent's interest in the land had ceased to exist two days previously. On the 1st October, 1958, he commenced these proceedings for a declaration that the transfer of the first respondent's interest to the second respondent was fraudulent as against him and for consequential reliefs to enable him to proceed to execution over the land as against the first respondent.

In the event the learned trial Judge, after giving the most careful consideration to the evidence, made the following findings of fact: firstly, that while the first respondent had acted fraudulently the second respondent was not a party to the fraud; and secondly, that the second respondent had paid the full consideration for the purchase of the land.

At the hearing of this appeal yesterday Mr. Sharma for the appellant analysed the evidence with characteristic thoroughness and urged this Court to say that in all the circumstances, if the proper inferences had been drawn from the evidence, the learned trial Judge ought to have found that there was collusion between the respondents to execute a fraudulent transfer and further, that on the balance of probability the transfer was made without consideration.

This Court has often to consider the question of interference with the findings of fact of a trial Judge. It is not, in my opinion, necessary to repeat the passages from the notes of evidence to which our attention was drawn by Mr. Sharma or to quote again the well-known dicta on this subject which are to be found in the line of cases *The Hontestroom (Owners)* v. *The Sagaporack (Owners)*,[1] *Powell* v. *Streatham Manor Nursing Home*,[2] *Watt* v. *Thomas*,[3] and *Benmax* v. *Autin Motor Co. Ltd.*[4] It is enough to say that bearing in mind the principles that have been enunciated in those cases I see no reason to disturb the findings arrived at by the learned trial Judge on a balanced consideration of the evidence before him. In the result, my view is that the second respondent must be held to be innocent of any complicity in the fraud perpetrated against the appellant by the first respondent and to have paid the stated consideration for the transfer of the property to himself.

Mr. Sharma devoted much of his argument to inviting us to have recourse to the common law of England. There is, he says, no statute in force in the Federation dealing specifically with conveyances in fraud of creditors. In the absence of any such statute the common law is to be invoked by virtue of sub-section (1) of section 3 of the Civil Law Ordinance, 1956. The common law applicable to this question is set out in 13 Eliz. c. 5, which is a statute declaratory of the common law: *Rickards* v. *Attorney-General*;[5] *Cadogan* v. *Kennet*.[6] The provisions are summarised in *Kerr* on Fraud and Mistake, 7th Edition, page 298, as follows:—

> "The statute 13 Eliz. c. 5, was made for the protection of creditors. It provided, in effect, that all conveyances and dispositions of property real or personal, made with the intention of delaying, hindering, or defrauding creditors, should be null and void as against them, their heirs, etc., and assigns. It also provided that nothing therein contained should extend to any estate or interest made on good consideration and *bona fide* to any person not having, at the time, any notice of such fraud."

This argument which was advanced with Mr. Sharma's usual persuasiveness, suffers from two infirmities. In the first place, it derives its force from the assumption that the second respondent did not accept the transfer of the land in good faith or that he did not give good consideration for it; and that assumption is

destroyed by the findings of fact of the learned trial Judge. Secondly, it assumes the absence of any statutory provision for avoiding the consequences of frauds on creditors; but such provision does exist, if not in a special statute, at least so far as fraudulent dispositions of land are concerned in section 42 of the Land Code. Section 3(1) of the Civil Law Ordinance only comes into operation to repair a *lacuna*, and no such *lacuna* exists in the law applicable to the present case. I think that Mr. Sharma appreciated this because after some discussion he conceded that if his argument was to prevail he must bring his case within sub-section (ii) of section 42 of the Land Code.

The relevant provisions of section 42 are:

(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.

(iii) .....

(iv) Nothing in sub-sections (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him.

(v) .....

(vi) Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law.

Mr. Sharma sought to invoke sub-section (vi) in aid of the appellant's case, by arguing that "operation of law" includes the operation of the common law. But for the reasons which I have already stated the common law is not available to him, and even if it were the argument would, on the findings of fact, be defeated by the saving for *bona fide* transactions.

As I see it, the case boils down to the application of section 42 to the facts as found by the learned trial Judge. The proprietor whose title is assailed is the second respondent. His title is indefeasible unless he is proved to be a party to the fraud. His title is therefore protected by sub-section (iv).

For these reasons I would dismiss the appeal with costs.

Neal J. concurred.

Appeal dismissed.

Solicitors: *N. Sharma; Arulanandon & Co.*